

Maurer School of Law: Indiana University Digital Repository @ Maurer Law

Articles by Maurer Faculty

Faculty Scholarship

1981

The Taxation of Employee Fringe Benefits

William D. Popkin

Indiana University Maurer School of Law, popkin@indiana.edu

Follow this and additional works at: <http://www.repository.law.indiana.edu/facpub>

 Part of the [Labor and Employment Law Commons](#), [Taxation-Federal Commons](#), and the [Tax Law Commons](#)

Recommended Citation

Popkin, William D., "The Taxation of Employee Fringe Benefits" (1981). *Articles by Maurer Faculty*. Paper 950.
<http://www.repository.law.indiana.edu/facpub/950>

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.



BOSTON COLLEGE LAW REVIEW

VOLUME XXII

MARCH 1981

NUMBER 3

THE TAXATION OF EMPLOYEE FRINGE BENEFITS†

WILLIAM D. POPKIN*

Tax-free employee fringe benefits are a significant tax equity problem that seems to defy solution. Section 61 of the Internal Revenue Code¹ and the Regulations² appear to tax all fringe benefits, but the employee's actual tax base is not so broad. Statutory provisions,³ administrative rules,⁴ and uncodified administrative practice⁵ exclude benefits that could be taxed. The reasons for this exclusion are not hard to find. The administrative difficulty of determining objective market value, such as the rental value of property,⁶ is compounded by the theoretical problem of determining subjective value, which is what the employee would pay for the property.⁷ In some cases, social policy also might argue for an exemption to encourage the employer to provide socially desirable benefits, such as insurance.⁸ Nonetheless, the equity concerns regarding tax-free benefits refuse to disappear. Fringe benefits "vary from industry to industry, from employer to employer within industries, and from employee to employee in the case of a single employer."⁹ The result is unequal taxes paid by taxpayers with

† Copyright © 1981 by Boston College Law School.

* Professor of Law, Indiana University (Bloomington).

¹ I.R.C. § 61(a)(1).

² Treas. Reg. § 1.61-2(d) (1979).

³ See, e.g., I.R.C. § 79 (group-term life insurance purchased for employees); § 106 (contributions by employer to accident & health plans); § 120 (amounts received under qualified group legal services plans); § 127 (educational assistance programs).

⁴ See, e.g., Treas. Reg. § 1.61-2(d)(ii)(b) (1979) (cost of group-term life insurance on life of spouse or children of an employee — \$2,000 or less); Rev. Rul. 59-58, 1959-1 C.B. 17 (excluding value of turkey, ham, or other items of merchandise of similar nominal value, distributed by an employer to an employee on a holiday as a means of promoting good will).

⁵ See AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, FRINGE BENEFITS: A PROPOSAL FOR THE FUTURE 58 n.5 (April 1979) [hereinafter cited as AICPA].

⁶ JOINT COMM. ON INTERNAL REVENUE TAXATION, 93d CONG., 2d SESS., EXAMINATION OF PRESIDENT NIXON'S TAX RETURNS FOR 1969 THROUGH 1972, 159-62 (Comm. Print 1974).

⁷ See text and notes at notes 46-47 *infra*.

⁸ See I.R.C. §§ 79, 106, 120. See also note 3 *supra*.

⁹ TASK FORCE ON EMPLOYEE FRINGE BENEFITS, COMM. ON WAYS AND MEANS, U.S. HOUSE OF REPRESENTATIVES, 95TH CONG., 2D SESS., TAX TREATMENT OF FRINGE BENEFITS 2, 4 (Comm. Print 1978) (statement of Donald C. Lubick, Assistant Secretary of the Treasury for Tax Policy) [hereinafter cited as Lubick].

equal incomes (horizontal inequity) and a reduction in the intended impact of progressive rates (vertical inequity).

Efforts to adopt a comprehensive approach to taxing fringe benefits have not met with success. In 1975, the Department of the Treasury (Treasury) published a Discussion Draft of Proposed Regulations¹⁰ in an attempt to bring some order out of the chaos, but the effort was aborted when Congress suspended the Treasury's rulemaking authority.¹¹ Congress, however, has not come up with its own solution to this taxation problem. Rather, it has managed only minor reforms, such as tightening up on the taxation of entertainment facilities¹² and foreign travel,¹³ and prohibiting discrimination among employees receiving exempt medical-expense reimbursements from self-insured plans.¹⁴ The only congressional effort of a more inclusive nature has been a "rough first draft" by a Task Force assigned to study fringe benefits.¹⁵

Yet the need for a comprehensive congressional approach to taxing employee fringe benefits continues. This need is evidenced by the variety of proposals that have followed the rise and fall of the Treasury's Discussion Draft. At one extreme is the approach taken by the Editors of the *Harvard Law Review*,¹⁶ who are extremely critical of the generosity shown to taxpayers by the Discussion Draft.¹⁷ This criticism is probably a result of their primary focus on the theoretical bases for identifying the taxable component in fringe benefits.¹⁸ Such

¹⁰ Proposed Treas. Reg. § 1.61-16 (discussion draft) [hereinafter cited as Discussion Draft], 40 Fed. Reg. 41,118 (1975). The Discussion Draft was not issued as a Proposed Regulation because the Commissioner of Internal Revenue withheld his consent. TASK FORCE ON EMPLOYEE FRINGE BENEFITS, COMM. ON WAYS AND MEANS, U.S. HOUSE OF REPRESENTATIVES, 95TH CONG., 2D SESS., TAX TREATMENT OF FRINGE BENEFITS, 12 (Comm. Print 1978) (statement of Jerome Kurtz, Commissioner of Internal Revenue). Apparently, the Internal Revenue Service preferred to proceed by issuing Revenue Rulings on an ad hoc basis. Hickman, *The Outlook for Fringe Benefits*, 29 S. CAL. TAX INST. 459, 460-64 (1977). The Discussion Draft was later withdrawn, 41 Fed. Reg. 56,334 (1976), and Revenue Rulings were never issued. Proposed Regulations taxing tuition remission for a university professor's children were issued, but they too were withdrawn. Proposed Treas. Reg. § 1.117-4(c), 41 Fed. Reg. 48,132 (1976), withdrawn 42 Fed. Reg. 3,181 (1977).

¹¹ Pub. L. No. 95-427, § 1, 92 Stat. 996 (1978), extended by Pub. L. No. 96-167, § 1, 93 Stat. 1275 (1978).

¹² I.R.C. § 274(a)(1)(B).

¹³ I.R.C. § 274(h).

¹⁴ I.R.C. § 105(h).

¹⁵ STAFF FOR THE TASK FORCE ON EMPLOYEE FRINGE BENEFITS, HOUSE COMMITTEE ON WAYS AND MEANS, 96TH CONG., 1ST SESS., DISCUSSION DRAFT AND REPORT (Comm. Print 1979) [hereinafter cited as PICKLE REPORT].

Congress also has been busy adding to the list of socially desirable tax-exempt benefits. I.R.C. § 120 (legal insurance); I.R.C. § 124 (commuter-vehicle benefits); I.R.C. § 127 (educational-assistance benefits). It has also expanded the exclusion for nonluxury meals. I.R.C. § 119(b)(2)-(3).

¹⁶ Note, *Federal Income Taxation of Employee Fringe Benefits*, 89 HARV. L. REV. 1141, 1169-72 (1976) [hereinafter cited as *Federal Income Taxation*].

¹⁷ *Id.* at 1159-69.

¹⁸ *Id.* at 1144-48. For other theoretical discussions of taxing fringe benefits, see generally H. McCAULEY, FRINGE BENEFITS AND THEIR FEDERAL TAX TREATMENT (1959); W. POPKIN, THE DEDUCTION FOR BUSINESS EXPENSES AND LOSSES 84-95 (1973); Halperin, *Business Deductions for Personal Living Expenses: A Uniform Approach to an Unsolved Problem*, 122 U. PA. L. REV.

a focus tends to produce intolerance of practical concessions, including those found in the Treasury's approach.¹⁹ At the other extreme are the approaches taken by the Task Force appointed by the House of Representatives²⁰ and the American Institute of Certified Public Accountants,²¹ which show both an excessive generosity towards taxpayers and a lack of concern for theoretical considerations.²²

Both practical and theoretical concerns must have their due. To accomplish that objective, this article proposes a comprehensive and workable approach to taxing employee fringe benefits. While some attention will be focused on the theoretical issues, the discussion will focus on the importance of finding new ways to structure the taxation of fringe benefits. This analysis will make the theoretical conclusions favoring taxation more palatable and the excessive generosity of some recent proposals unacceptable. Part I divides fringe benefits into three categories relevant for analyzing theoretical and administrative problems, but more especially for structuring a new approach to the problem. Part II considers whether negotiations between employers and employees eliminate tax inequity. Although such negotiations attempt to adjust after-tax wages to account for tax-free fringe benefits, this section of the article explains why these bargaining sessions still do not resolve the inequity problem. Part III presents two proposals as part of an overall approach to improving tax equity. One proposal encourages employers to capture more of the employee's tax benefit for themselves by reducing cash wages. The second proposal argues for taxing certain fringe benefits only when received by high-income employees and employees who control their employers. If adopted, these two proposals will go a long way towards eliminating the inequity of tax-free fringe benefits.

I. CATEGORIES OF FRINGE BENEFITS

The variety of fringe benefits is one of the reasons it is so difficult to adopt a comprehensive and workable approach. The initial step towards managing the complexity of the problem is to identify patterns which are useful for tax policy. For this purpose, fringe benefits can be divided into three categories. The first category includes benefits whose costs are incurred solely to compensate employees. This compensatory factor distinguishes them from the other two categories of benefits, whose costs are incurred for noncompensatory reasons. Category one includes socially desirable benefits, such as insurance,²³ as well as other personal benefits, such as the free use of cars purchased for employees by

859 (1974) [hereinafter cited as Halperin]; Nolan, *Taxation of Fringe Benefits*, 30 NAT'L. TAX J. 359 (1977) [hereinafter cited as Nolan].

¹⁹ *Federal Income Taxation*, *supra* note 16, at 1159-69.

²⁰ PICKLE REPORT, *supra* note 15.

²¹ AICPA, *supra* note 5 at 2-16.

²² Both proposals disregard personal consumption which is a by-product of business expenses and are generous to the taxpayer when the employer does not incur incremental cost. PICKLE REPORT, *supra* note 15, at 6-7, 9-10; AICPA, *supra* note 5, at 4-5. *See also* Discussion Draft, *supra* note 10, at 41, 119-20.

²³ DEPARTMENT OF THE TREASURY, THE PRESIDENT'S 1978 TAX PROGRAM 145 (1978) [hereinafter cited as THE PRESIDENT'S 1978 TAX PROGRAM].

employers.²⁴ The theoretical question to be resolved with respect to category one benefits is whether an employee's subjective value for such benefits is sufficient to justify taxation.²⁵ Generally, the significant employer cost incurred for compensatory reasons is a definite indication that most employees derive significant value from such benefits and that their omission from the tax base would be a serious inequity. Only a social policy favoring category one benefits can justify their exclusion.

The second category is comprised of benefits whose costs are incurred for noncompensatory reasons, except for insubstantial amounts and for the opportunity cost of charging the employee. Yet category two benefits produce value that can be made available to the employee. Among the benefits in this category are inventory sold to employees at wholesale cost²⁶ and free airline travel for airline company employees if the tickets could not otherwise be sold.²⁷

Recent proposals for taxing fringe benefits have been quite favorable to category two benefits.²⁸ Four reasons might be given for this favorable treatment, three of which are justified. First, the benefit is likely to be small, given the absence of substantial noncompensatory costs to the employer.²⁹ This rationale, however, carries its own limitations. Favorable treatment is inappropriate whenever the size of the benefits is clearly very large in relation to noncompensatory costs, such as when employers provide tuition remission to families of university professors³⁰ and when the benefits are significant in the aggregate for particular employees.³¹ Second, the benefits are often available to

²⁴ Discussion Draft, *supra* note 10, at § 1.61-16(f) (Example 14).

²⁵ Nolan, *supra* note 18, at 361-62; Summary and Explanation of Discussion Draft of Proposed Regulations on Fringe Benefits, *reprinted in* AICPA, *supra* note 5, at 77.

²⁶ Discussion Draft, *supra* note 10, at § 1.61-16(f) (Example 3); AICPA, *supra* note 5, at 13.

²⁷ Discussion Draft, *supra* note 10, at § 1.61-16(f) (Example 1); AICPA, *supra* note 5, at 12-13.

²⁸ Discussion Draft, *supra* note 10, at § 1.61-16(a)(1)-(2); AICPA *supra* note 5, at 4. The PICKLE REPORT, *supra* note 16, at 6, makes exemption depend on the absence of substantial incremental cost, but does not require that the benefits originate in noncompensatory business expenditures.

²⁹ The substantiality of noncompensatory costs may be hard to determine. In one proposal, for example, capital costs are usually but not always disregarded, Discussion Draft *supra* note 10, at § 1.61-16(f) (Examples 1 & 10), *commented on in Federal Income Taxation*, *supra* note 16, at 1162 n.100, and marginal costs are usually but not always considered, Discussion Draft *supra* note 10, at § 1.61-16(f) (Example 1), *commented on in Federal Income Taxation*, *supra* note 16, at 1162-63. Moreover, the appearance of insignificant compensatory costs might be manipulated by over-expansion so that unwanted goods or services can be made available to employees, *Federal Income Taxation*, *supra* note 16, at 1162.

³⁰ Treas. Reg. § 1.117-3(a) (1980). *See also* Discussion Draft, *supra* note 10, at § 1.61-16(f) (Examples 5(c) & 6), exempting substantial travel benefits. The Staff of the Joint Committee on Internal Revenue Taxation did not exempt President Nixon on the value of his family's travel even though there was no incremental cost due to their travel. JOINT COMM. ON INTERNAL REVENUE TAXATION, 93D CONG., 2D SESS., EXAMINATION OF PRESIDENT NIXON'S TAX RETURNS FOR 1969 THROUGH 1972, at 165-66 (Comm. Print 1974).

³¹ PICKLE REPORT, *supra* note 15, at 9, exempts category two benefits unless their aggregate value to an employee is significant. *Cf.* 17 C.F.R. § 229.20-Item 4(a), Intro. 2(d)(i), (iii) (1979) (SEC remuneration disclosure rules aggregate "personal benefits" to determine whether

lower-income employees. So long as controlling and high-income employees enjoy tax-free fringe benefits, there will be considerable pressure to exempt benefits enjoyed by employees earning lesser salaries.³² Third, valuation problems are formidable.³³ Relying on the employer's cost as a proxy for value is an unacceptable solution because the employer's cost, when reduced by any employee payment, would be too small.³⁴ Consequently, there is no adequate substitute in the case of category two benefits for confronting valuation difficulties.

Fourth, the personal consumption appears to be enjoyed without draining economic resources, because of the absence of any substantial added costs to the employer. This rationale for according favorable treatment to category two benefits is insupportable. Even if we accept the doubtful factual proposition that category two benefits are economically costless,³⁵ this fact is irrelevant for defining taxable income. The requirement that economic resources be utilized before there can be taxable income is a familiar theme,³⁶ usually contrasted with the use of a subjective "utility" or "satisfaction" measure of income.³⁷ The argument, in brief, is that because the tax has as its purpose and effect the deflec-

value is so much greater than incremental cost that value rather than cost must be disclosed, and whether the value is large enough to be reported separately in a footnote).

Favorable treatment of category two benefits because they are presumably small may seem redundant, given a de minimis exception, *Federal Income Taxation*, *supra* note 16, at 1168-69, which is a feature of every proposal. Discussion Draft, *supra* note 10, at § 1.61-16(c); AICPA, *supra* note 5, at 6; PICKLE REPORT, *supra* note 15, at 10. Application of the de minimis rule, however, is itself difficult and there are additional arguments favoring category two benefits. See text at notes 32-34 *infra*.

³² *Federal Income Taxation*, *supra* note 16, at 1160; Summary and Explanation of Discussion Draft of Proposed Regulations on Fringe Benefits, *reprinted in* AICPA, *supra* note 5, at 76-77.

³³ Nolan, *supra* note 18, at 361-62; Summary and Explanation of Discussion Draft of Proposed Regulations on Fringe Benefits, *reprinted in* AICPA, *supra* note 5, at 77; Lubick, *supra* note 9, at 51-53. The SEC requires reporting of discriminatory personal benefits that are very difficult to value only if they are likely to exceed \$10,000 per employee. 17 C.F.R. § 229.20-Item 4(a), Instruction 2(d)(ii) (1979).

³⁴ Both the Discussion Draft, *supra* note 10, at § 1.61-16(d) and the PICKLE REPORT, *supra* note 15, at 12, tax value when an item is taxable. AICPA *supra* note 5, at 7-8, would tax the lower of cost or value. Cost refers to incremental cost, unless the primary purpose of the expenditure is personal consumption, in which case fixed costs are included. The AICPA proposal would, in effect, exclude category two benefits because the primary purpose of the employer's expenditure is not personal and incremental costs are small. The Securities and Exchange Commission is sensitive to the possibility that value will exceed cost. It requires disclosure of personal benefits based on value when the excess is substantial. 17 C.F.R. § 229.20-Item 4(a), Instruction 2(d)(i) (1979).

³⁵ See *Federal Income Taxation*, *supra* note 16, at 1162-63.

³⁶ Wueller, *Concepts of Taxable Income*, I, 53 POL. SCI. Q. 83, 106 (1938); Goode, *Economic Definitions of Income in COMPREHENSIVE INCOME TAXATION* 8 (1977); Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309, 336, 356 (1972) [hereinafter cited as Andrews]; AICPA, *supra* note 5, at 44. But see Halperin, *supra* note 18, at 882-83.

³⁷ Andrews, *supra* note 36, at 336, 356; Warren, *Would a Consumption Tax Be Fairer Than an Income Tax?*, 89 YALE L.J. 1081, 1084, 1090-93 (1980). See also Nolan, *supra* note 18, at 361 (wealth vs. utility). Cf. Gunn, *The Case for an Income Tax*, 46 U. CHI. L. REV. 370, 382-86 (1979) [hereinafter cited as Gunn] (tax should be imposed on income-producing efforts, not sacrifice).

tion of economic resources for social purposes, the tax base therefore should be economic resources that the individual allocates to his own use.³⁸ This "economic resources" concept is useful only to identify as crucial to tax fairness the question whether value is enjoyed by the individual in a private activity, and is thereby beyond the government's right to share.³⁹ Not surprisingly, in our market-oriented economy, value generated by using economic goods and "non-private" resources are almost identical categories.⁴⁰ Nevertheless there may be "private" value derived from the use of economic resources. The enjoyment of leisure, for example, arguably results from a private⁴¹ decision which should not be taxed, even though its value depends on the use of economic resources, so much so that an excise tax on such goods is a way of taxing leisure. Similarly, some value should be taxed even if it does not use up economic resources, so long as the tax does not impinge on a "private" sphere of activity.⁴² Such is the case of fringe benefits whose value is created without using up economic resources.⁴³

In sum, the justification for excluding category two benefits is an aggregation of three factors — the tendency for the benefits to be small, a second best solution based on tax exemption of other benefits received by other employees, and the problems of valuation. The argument for special treatment of category two benefits is subject to a major qualification, however. When such benefits are provided on a discriminatory basis to controlling or high-income employees, no justification for exclusion exists. Discriminatory benefits are likely to be worth a great deal to these employees⁴⁴ and the second best argument is inapplicable because these employees are likely to be the ones enjoying other tax-free fringe benefits.⁴⁵

The third category of fringe benefits, like the second grouping, includes benefits whose costs are incurred for noncompensatory reasons. Category three benefits, however, provide employees with personal consumption as a necessary by-product of the expenditure. Unlike category two benefits, the employer can-

³⁸ Andrews, *supra* note 36, at 325-26, 356; *But see* Halperin, *supra* note 18, at 882-83; Warren, *Fairness and a Consumption-Type or Cash Flow Personal Income Tax*, 88 HARV. L. REV. 931, 932-33 (1975) [hereinafter cited as Warren].

³⁹ Kelman, *Personal Deductions Revisited: Why They Fit Poorly in an "Ideal" Income Tax and Why They Fit Worse in a Far From Ideal World*, 31 STAN. L. REV. 831, 841-43 (1979) [hereinafter cited as Kelman]; Warren, *supra* note 37, at 1096-97 (1974) (taxing wages is on par with forced labor).

⁴⁰ *But see* R. NOZICK, ANARCHY, STATE AND UTOPIA 169-70 (1974) (taxing wages is on a par with forced labor).

⁴¹ Kelman, *supra* note 39, at 842.

⁴² *But see* Andrews, *supra* note 36, at 344-70 (arguing for charitable deduction when it does not use up economic resources).

⁴³ Defining "taxable value" remains an issue. Nevertheless, if the concept of "economic resources" is explicitly assigned the task of distinguishing private resources from those which the government can legitimately share, a subjective satisfaction criterion can be admitted along with "economic resources" into the definition of income. "Satisfaction" then becomes a necessary but not sufficient criterion for taxation. Without "satisfaction" as a criterion, it is impossible to decide whether a fringe is a benefit, *see* Gunn, *supra* note 37, at 384-85, or whether wealth is fairly taxable. Thus the need for the satisfaction criterion is obvious.

⁴⁴ The size of the benefit also justifies disallowing an exclusion under the circumstances described in text at notes 30-31 *supra*.

⁴⁵ Discussion Draft, *supra* note 10, at § 1.61-16(a)(3); PICKLE REPORT, *supra* note 15, at 6; AICPA, *supra*, note 5, at 4 (General Rule #3).

not make the noncompensatory business expenditure without also providing the employee with personal consumption. The distinction is that between allowing an employee on a business trip to bring along a relative for personal reasons — category two benefit — and the employee deriving personal consumption from the business trip itself — category three benefit. Despite the business necessity for the expenses providing category three benefits, there may be significant amounts of personal consumption enjoyed by employees.

Determining the existence of taxable personal consumption is difficult, and the problem is not obviated by describing the benefits as tax-free “working conditions.”⁴⁶ Among the difficulties is the problem of valuing the benefit by determining what cash expenditure the taxpayer would incur to acquire it. Taxable value should not be determined by considering what the taxpayer would spend at his present standard of living, because the taxpayer could reasonably argue that he now could not afford the benefit. The resulting exclusion then would allow the employee to enjoy tax-free a standard of living that he aspired to but could not attain at his present salary. Supplementing the employee’s current wages to determine hypothetical expenditures, however, presents its own problems. The taxpayer’s subjective value for the fringe benefit cannot be added to his income to discover what the employee would be likely to spend, because that would involve the circularity of increasing cash wages by the value we are trying to determine. Yet if objective market value is used to supplement current wages, income levels may be unrealistically inflated to determine whether the employee would purchase the benefit. Finally, it is uncertain whether value to the employee should be determined on the assumption that the benefit is offered aggressively by the employer and without significant search costs for the employee, even though that may not be the way goods and services are presented to the employee in the marketplace.⁴⁷

These questions illustrate the problem of identifying taxable personal consumption in category three benefits, but are not meant to suggest that taxation is inappropriate when these problems arise.⁴⁸ The political process should be able to reach agreement on when there is significant personal consumption, valued subjectively, to justify taxing objective market value.⁴⁹ In this author’s view, for example, significant personal consumption is a likely by-product of travel and entertainment⁵⁰ and lavish office furnishings,⁵¹ less likely

⁴⁶ Lubick, *supra* note 9, at 4; Summary and Explanation of Discussion Draft of Proposed Regulations on Fringe Benefits, *reprinted in* AICPA, *supra* note 5, at 76.

⁴⁷ See *Turner v. Commissioner*, 13 T.C.M. 462, 462-63 (1954). For example, in determining the value of Mr. Turner’s steamship ticket, do we disregard the fact that the seller of these tickets would not go out of his way to make them available to Mr. Turner?

⁴⁸ See *Federal Income Taxation*, *supra* note 16, and Halperin, *supra* note 18, for a discussion of how taxable personal consumption can be identified.

⁴⁹ Nolan, *supra* note 18, at 361-62.

⁵⁰ See THE PRESIDENT’S 1978 TAX PROGRAM, *supra* note 23, at 182. The tax law disallows deductions for such expenses in several situations where SEC disclosure rules would not apply. Compare I.R.C. § 274(a) (disallowing deduction of expenses for entertainment facilities) with 43 Fed. Reg. 6062-63 (Questions 20 and 22) (1978) (no disclosure when yachts and country clubs used for business).

⁵¹ The SEC has rejected suggestions for disclosure of expenses to furnish the chief executive’s office. See 43 Fed. Reg. 58,186 (1978).

with expenses enabling the employee to work late, such as supper money,⁵² or to work irregular hours, such as free parking,⁵³ and unlikely with expenses to protect the employee's safety.⁵⁴

While category three benefits can be identified and valued to allow for their taxation, at first glance it may seem that equity is possible even without taxing such benefits. For example, the business need for the expense means that the employees who enjoy benefits from the expenditure are reasonably classified. Such classifications are relevant as evidence that employers are not favoring particular groups of employees with tax-free personal consumption.⁵⁵ In addition, the personal consumption of category three benefits cannot be enjoyed without also serving the employer's business need. Thus the employee is deprived of the element of choice that so often accompanies personal consumption.⁵⁶ A reasonable classification of employees and reduced choice do not, however, eliminate problems of discrimination in the availability of tax-free income. Only controlling or high-income employees might be in the category of employees who receive benefits as a by-product of business expenses⁵⁷ and these benefits may soon become integrated into the employee's life style, despite the lack of choice. Consequently, category three benefits may provide even more tax-free personal consumption than category two benefits, and may be discriminatory in effect, despite their being a necessary by-product of business expenses.

Employee fringe benefits thus can be divided into three categories: (1) benefits whose costs are incurred for compensatory purposes; (2) benefits whose costs, although incurred for noncompensatory reasons, produce value that can be provided to employees; and (3) benefits where the costs are incurred for noncompensatory reasons but where personal consumption is a necessary by-product of the expense. Although strong reasons exist for taxing many of these benefits, they still remain as tax-free income to employees. Before considering ways to tax these benefits, however, we will focus on whether the equity problem can be resolved in a manner other than including fringe benefits in taxable income. Specifically, the likelihood that employees receiving tax-free fringe benefits will have their taxable wages decreased to offset their tax advantage will be explored. That is the subject of Part II.

II. BARGAINING AND TAX EQUITY

A possible rationale for permitting fringe benefits to be tax-free is that bargaining between the employer and employee might result in a reduction of

⁵² See Discussion Draft, *supra* note 10, at § 1.61-16(f) (Example 8).

⁵³ *Id.* (Example 10).

⁵⁴ *Id.* (Examples 7 & 13); AICPA, *supra* note 5, at 6. See also 43 Fed. Reg. 6063 (Question 33) (1978) (SEC remuneration disclosure rules do not apply to safety benefits).

⁵⁵ Discussion Draft, *supra* note 10, at § 1.61-16(a)(3).

⁵⁶ See *United States v. Drescher*, 179 F.2d 863, 865 (2d Cir. 1950) (in-kind savings); *Turner v. Commissioner*, 13 T.C.M. 462, 463 (1954) (in-kind consumption).

⁵⁷ See 44 Fed. Reg. 74,814 (1979) (SEC finds a discriminatory effect when a benefit is available to all employees but the price or nature of the product limits actual availability). Cf. I.R.C. § 120(c)(3) (prohibiting excessive benefits for high-income employees even if plan is non-discriminatory).

the employee's salary based on the value of the untaxed benefits he receives.⁵⁸ Such a reduction would resolve the tax equity problem with respect to those fringe benefits. The following example illustrates how the reduction in employee wages is determined. Tax-free fringe benefits have a cash wage equivalent, which is the pre-tax cash wage needed to provide the employee with personal consumption equal to the fringe benefit.⁵⁹ Thus, if an employee in the 50% tax bracket would pay \$2,000 for life insurance and it is provided tax-free by the employer, the cash wage equivalent is \$4,000. The explanation for this result is that the employee would have to receive \$4,000 in taxable wages to obtain \$2,000 of after-tax personal consumption. The employer can be expected to confront the employee with the advantages of tax-free fringe benefits and insist on a downward adjustment in cash wages, the maximum adjustment being the cash wage equivalent. Instead of receiving \$40,000 in cash wages, for example, the employer would offer the employee \$36,000 plus the tax-free fringe benefit of life insurance. As long as the employer's expense to provide the benefit is less than the downward cash wage adjustment, the employer will prefer to provide the benefit rather than cash. Further, the employee should be as willing to receive \$36,000 cash plus the tax-free fringe benefit as he would be to receive \$40,000 cash.

If employer-employee bargaining results in the employee receiving cash wages reduced by the cash wage equivalent of a tax-free fringe benefit, he does not enjoy an after-tax advantage over the individual who receives cash wages without a reduction, and tax equity is preserved. In many situations, however, the interplay of five factors may result in a failure to eliminate tax inequity through employer-employee negotiations. These factors, discussed below, include uncertainty about employer expenditure; employee's failure to focus on the fringe benefit; preference concealment; variations in cash wage equivalents among employees; and employee bargaining power. Viewed together, these factors indicate that the tax equity problem with respect to fringe benefits cannot be left entirely to the negotiations table for a solution.

A. *Uncertainty About Employer Expenditure*

If the amount to be provided to the employee is uncertain, the employee's wages will not be reduced by the cash wage equivalent of the benefit and tax equity may not be achieved. Uncertainty regarding the amount of actual benefits might occur, for example, with travel and entertainment and the value of a bargain purchase. In such a situation there is nothing to prevent the employer and employee from estimating the value of the benefits and discounting their value for uncertainty. The discounted value then could enter into the wage negotiation process. Adjusting cash wages for the cash wage equivalent of the discounted value, however, would not solve the tax equity problem. The employee still would escape tax on the actual benefits received

⁵⁸ See Bittker, *Equity, Efficiency and Income Tax Theory: Do Misallocations Drive Out Inequities?*, 16 SAN DIEGO L. REV. 735 (1979) [hereinafter cited as Bittker].

⁵⁹ *Federal Income Taxation*, *supra* note 16, at 1144-45; Halperin, *supra* note 18, at 895-98; Lubick, *supra* note 9, at 2-3.

during the year, if their value exceeded the adjustment in cash wages based on the smaller discounted value.

As an illustration of this problem, consider the employee in the 50% tax bracket. To him, a fringe benefit with a \$2,000 discounted value has a cash wage equivalent of \$4,000. If the employee later receives a tax-free fringe benefit worth \$5,000, its cash wage equivalent is \$10,000, only \$4,000 of which could have reduced cash wages. The employee will continue to enjoy \$6,000 of cash wage equivalent not accounted for either by taxing the benefit or by a downward cash wage adjustment. The employee is in the same position as an investor in the 50% tax bracket who invests \$2,000 after tax income and enjoys a \$3,000 tax-free return over his investment. Exemption of the \$3,000 return violates the requirements of an income tax, in which both the investment and the return should be taxed.⁶⁰ This example therefore denotes that where uncertainty exists as to the value of future benefits, a downward adjustment in the employee's wages may not resolve the problem of tax inequity.

B. *Employee's Failure to Focus on Fringe Benefit*

Even if the amount of the benefit is certain, the value that the negotiators assume the benefit will have to the employee may be less than the value the employee would place on the benefit if he purchased it with cash. The reason for the lowered value is that the employee might not focus on the fringe benefit in the wage negotiation process. Two explanations can be offered for this lack of focus. First, the importance of the monetary wage as a status symbol might crowd out the employee's concern for the value of in-kind benefits.⁶¹ Second, the actual value of the benefit to the employee might be determinable only with some effort. This is likely to be true of insurance benefits with various deductible, co-insurance, and family benefit features. The employee purchasing the benefits with cash might calculate their value and find that they are worth more to him than appears to be the case when he only evaluates them casually as part of a compensation package.

Because the employee fails to direct his attention to the fringe benefits and consequently assigns a lower value to them during negotiations, the resulting decrease in salary will not accurately reflect the value of the benefits. Thus, lack of focus, like the factor of uncertainty in benefit value, indicates that salary adjustments made through bargaining often may not provide the desired tax fairness.

C. *Preference Concealment*

Even if the employee knew the amount of the benefit and focused on its value, a wage adjustment for that value will occur only if it is introduced accurately into the wage negotiation process. The employee will do his best to reduce the value of the benefit by feigning disinterest, although that may be difficult to

⁶⁰ Cf. Graetz, *Implementing a Progressive Consumption Tax*, 93 HARV. L. REV. 1575, 1600-01 (1979) (horizontal equity is an *ex-post* concept).

⁶¹ See Scitovsky, *Are Men Rational or Economists Wrong*, in P. DAVID & M. REDER, NATIONS AND HOUSEHOLDS IN ECONOMIC GROWTH 223, 224-27 (1974) ("money illusion").

do when the benefit is well known and has attractions that overcome the symbolic value of cash wages. For example, the bargain sale of airline tickets to airline employees is such a prominent and glamorous feature of the compensation package that the employee may be unable to conceal his preference for such a benefit.⁶²

An employee who controls employer policy, however, might successfully conceal his preferences from the owners of the business, and thereby avoid a downward wage adjustment. Recent efforts by the Securities and Exchange Commission to expose fringe benefits received by highly paid employees to shareholder scrutiny probably were intended to encourage such adjustments.⁶³ Despite the new SEC rules, however, many benefits almost certainly escape shareholder scrutiny in situations where cash wages might be questioned.⁶⁴ The controlling nonowner employee, therefore, represents a special example of the "concealed preference" problem and will present serious equity problems because as a likely high-bracket taxpayer, his tax savings from receipt of the benefit will be significant. Existing tax law is occasionally sensitive to this problem, as evidenced by the provision including travel benefits in a controlling employee's income.⁶⁵

In sum, the relative ease with which employees, especially controlling nonowner employees, can conceal their preference for certain fringe benefits during the bargaining process provides another reason why wages will not be diminished during negotiations to the extent of the value of fringe benefits received by the employee.

D. *Variations in Cash Wage Equivalents Among Employees*

Variations in cash wage equivalents for the same fringe benefits is another factor which suggests that the decreasing of salaries by negotiators to compensate for benefits will not result in the equitable taxation of all employees. Such variation in cash wage equivalents among employees is caused by employee differences in their preferences and tax brackets. In Table 1, the "value" figure is a function not only of preferences for the benefit itself, but also of preferences that affect how subjective value enters into wage negotiations. Thus, variation in preferences for risk will affect the discount rates applied to the value of uncertain fringe benefits; variation in preferences for the status value of cash wages will affect the employee's enthusiasm for fringe benefits compared to cash wages; and variation in the value of time will affect the employee's willing-

⁶² Discussion Draft, *supra* note 10, at § 1.61-16(f) (Example 1).

⁶³ The SEC's remuneration disclosure requirements appear in 17 C.F.R. § 229.20 - Item 4 (1979). They apply to the five highest paid executive officers or directors who earn at least \$50,000 remuneration, including reportable fringe benefits in the \$50,000 figure. *Id.*, at Item 4(a)(1). The history of these rules appears in 42 Fed. Reg. 43,058 (1977); 43 Fed. Reg. 6060 (1978); 43 Fed. Reg. 58,181 (1978); 44 Fed. Reg. 74,813 (1979).

⁶⁴ The disclosure rules do not apply if the benefits are nondiscriminatory, 17 C.F.R. § 229.20 - Item 4, Instructions 2(c)-(d) (1979), or are a by-product of business-related expenses, *see* 43 Fed. Reg. 6061 (1978) (Question 6). *See also* 43 Fed. Reg. 6062, 6063 (1978) (Questions 20 & 22) (yachts and country club dues); 42 Fed. Reg. 43, 59-60 (1977) (parking and office space).

⁶⁵ Treas. Reg. § 1.274-4(f)(5)(i) (1980). *See also* 42 Treas. Reg. § 1.274-5(b)(ii) (1980) (record-keeping requirements not relaxed for controlling employees).

ness to spend time computing the actual value of a fringe benefit. The employee's ability to conceal preferences also will have the same effect as varying preferences in producing different cash wage equivalents for different employees. .

TABLE 1

*Cash Wage Equivalents of Tax-Free Fringe Benefits,
Depending on Value and Tax Bracket*

<i>Value*</i>	<i>Tax Bracket</i>		
	25%	50%	60%
4,000	5,333	8,000	10,000
3,000	4,000	6,000	7,500
1,500	2,000	3,000	3,750
0	0	0	0

*The values are arbitrary, but the variation among taxpayers reflects the differences among individual preferences.

If the employer could bargain separately with each employee, variation in the cash wage equivalent among employees would not prevent a downward adjustment of cash wages to eliminate the tax benefit. It will be extremely difficult, however, for employers to bargain separately with different employees because the cost of separate negotiations is substantial and, if unions represent employees, they are likely to establish a solid bargaining front. The result of a uniform employee bargaining position will probably be a limit on the downward cash wage adjustment to the cash wage equivalent of the employees with the lowest preference for the fringe benefit, leaving a tax benefit available to other employees. The reasons behind this result are first, that the cash wages paid in the absence of a tax-free fringe benefit are likely to reflect the employee's worth to the employer, and second, that the employee is likely to be able to command the same cash wage from other employers. Any effort to lower wages by more than the cash wage equivalent to employees with the lowest preference for the fringe benefit may therefore result in the loss of these productive employees to other employers.

The following is an illustration of the limit imposed on the downward cash wage adjustment. Assume that there are three employees in the 25% tax bracket who value a particular fringe benefit at \$1,500, \$3,000, and \$4,000 respectively and that, without the fringe benefit, taxable cash wages would be \$20,000. The employer who offered the fringe benefit to all three employees could make only a \$2,000 reduction in each employee's wages, which is the cash wage equivalent of the employee with the lowest preference for the fringe benefit. If the employer tried to lower wages by more than \$2,000, he would lose the low-preference employee to another employer because his wage package would be worth less than \$20,000. Such an action would be foolish on the employer's part because the employee is worth at least \$20,000. Efforts to lower the wages of other employees by more than \$2,000 are ruled out by the assumption that separate bargaining is impossible. The low-preference employee whose wages are bar-

gained down by his cash wage equivalent for the tax-free fringe benefit will not derive any advantage from the tax-free benefit. Rather, he will ultimately have \$1,500 in after-tax consumption whether he receives \$2,000 cash or the tax-free benefit. The two high-preference employees, however, will end up with compensation packages worth \$18,000 cash plus a cash wage equivalent of \$4,000 and \$5,333, rather than \$2,000, and tax inequity will persist.

After consideration of the above example, it may appear that introduction of higher-bracket employees into the wage negotiating process aggravates the equity problem seriously, especially if they have higher preferences for fringe benefits. (See Table 1.) It might even be suggested that nondiscrimination requirements, which make tax exemption depend on the availability of fringe benefits without discrimination among controlling, high-income, and low-income employees,⁶⁶ contribute to inequity by homogenizing the wage demands of high-preference-high-bracket employees with low-preference-low-bracket employees. Nevertheless, the effects of unionization and transactions costs in presenting employers with unified wage demands is much less likely to prevent employers from making separate wage adjustments among employees in different wage brackets. Consequently, low-tax-bracket employees might not influence the wage rates set for high-tax-bracket employees.⁶⁷

In conclusion, variations in cash wage equivalents for the same fringe benefits occur because employees differ in both their preferences and their tax brackets. Such variations may result in tax inequity if the employer decreases all of his employee's wages a given amount, regardless of the cash value that the fringe benefit has for each employee. It appears, however, that many times a tax inequity problem is reduced because an employer is more likely to make the same downward adjustment only in the salary of employees within the same wage and tax brackets.

E. *Employee Bargaining Power*

Even if the employee knows the amount of the benefit, focuses on its value, is unable to conceal his preference, and is unable to take advantage of the lower cash wage equivalents of other employees, the employee still might have sufficient bargaining power to prevent a downward wage adjustment equal to

⁶⁶ The Code is not entirely consistent in imposing nondiscrimination requirements. The statute prohibits discrimination in the following instances: I.R.C. § 401(a)(4)-(5), 401(k)(3)-(4), 408(k)(3) (retirement plan); I.R.C. § 120(c)(1) (legal insurance); I.R.C. § 124(c)(1) (commuter-vehicle benefits); I.R.C. § 127(b)(2) (educational-assistance benefits). Regulations prohibit discrimination for group-term life insurance. Treas. Reg. § 1.79-1(b)(1)(iii) (1980).

At present, an option to elect taxable benefits or cash will not destroy the exemption from tax-free benefits if the plan is nondiscriminatory. If the plan discriminates, only the high-income employees who benefit from the discriminatory provisions lose their tax exemption on tax-free benefits by virtue of the option. I.R.C. § 125(a)-(b). In the previous examples in this footnote, nondiscrimination is a condition of exemption for all employees.

Benefits pursuant to discriminatory medical and disability insurance plans are tax exempt, *see* I.R.C. §§ 105(a), (c)-(d) & 1106, except in the case of self-insured medical reimbursement plans, *see* I.R.C. § 105(h)(2).

⁶⁷ The low-bracket employees are likely to be different from low-bracket investors in the tax-exempt bonds in this respect. Bittker, *supra* note 58, at 742-44.

his cash wage equivalent. As long as the employer's cost is less than the employee's cash wage equivalent, the employer will gain from a downward wage adjustment less than the cash wage equivalent but greater than his cost. If the employee has enough bargaining power to capture some of the potential gain between the cash wage equivalent and the employer's cost, tax inequity persists.⁶⁸

Bargaining is therefore unlikely to drive out inequity. Uncertainty about employer expenditures, the employee's failure to focus on fringe benefits, concealment of employee preferences, variation in the cash wage equivalents among employees who bargain as a group, and employee bargaining power make reliance on the marketplace to achieve tax equity very doubtful. Nonetheless, the conditions for achieving cash wage adjustments that would produce equity or at least reduce inequity among employees might be encouraged by specific provisions in the tax law. Part III, dealing with specific proposals for taxing fringe benefits, will consider techniques for encouraging those conditions.

III. TWO PROPOSALS

The marketplace is an inadequate mechanism for eliminating the inequity of tax-free fringe benefits. Yet an across-the-board inclusion of all such benefits in income will not compensate for these marketplace deficiencies. Presumptions in favor of taxation will often overtax employees, and valuation in every individual case will be too burdensome. The present rulemaking paralysis, however, perpetuates an unsatisfactory state of affairs. In this section of the article, two proposals will be offered for restructuring the approach to the problem of taxing fringe benefits. The first proposal reduces inequity, not by taxing benefits, but by encouraging employers to capture more of the employee's tax-free fringe benefit through downward cash wage adjustments. The second proposal taxes certain fringe benefits received by controlling and high-income employees.

A. *Compulsory "Cafeteria Plans"*

A cafeteria plan offers employees a choice of cash or a variety of tax-free fringe benefits. Until recently, there was doubt whether a cash alternative to otherwise tax-exempt benefits would destroy the exemption.⁶⁹ Congress has now decided, however, that the cash option will not have that effect if offered on a nondiscriminatory basis,⁷⁰ and that, in any event, discrimination in offering the cash option will not destroy the exemption for rank-and-file employees.⁷¹ The proposal presented here is that Congress should consider the further step of making exemption for all employees depend on the existence of a cash option. The reason for this proposal is that a mandatory cash option increases the likeli-

⁶⁸ *Federal Income Taxation*, *supra* note 16, at 1145.

⁶⁹ See S. REP. NO. 95-1263, 95th Cong., 2d Sess. 74 (1978); THE PRESIDENT'S 1978 TAX PROGRAM, *supra* note 23, at 170-71.

⁷⁰ I.R.C. § 125.

⁷¹ I.R.C. § 125(a)-(b)(1).

hood that tax inequity will be reduced by encouraging the employer to reduce cash wages in an amount equal to the employee's cash wage equivalent for the tax-free fringe benefit.⁷²

The argument for a mandatory cash option has four major components. First, when employers offer a fringe benefit and can lower cash wages by the employee's cash wage equivalent, the employer realizes a gain to the extent that the cash wage equivalent exceeds the employer's expense for the benefit. Second, the cash wage equivalent that determines the employer's gain might be too low to eliminate tax inequity. The reasoning here is that the cash wage equivalent is set by the preferences of marginal employees with the lowest preferences, and the employer might find attempts to increase the cash wage equivalent of the marginal employees too costly. Third, a mandatory cash option would encourage the employer to attempt an increase in the cash wage equivalent of the marginal employees by eliminating the opportunity cost of making the attempt. Fourth, a mandatory cash option also might increase cash wage equivalents by focusing the employee's attention on the value of the benefit and making it harder to conceal preferences. Each of these four components of the mandatory cash option argument will be developed below.

1. Employer's Gain

The employer's gain from providing employees with a fringe benefit is a function of four factors:

- (1) the value placed on the benefit by the employee (V);
- (2) the value at which the benefit is included in taxable income (TV);
- (3) the employee's tax rate (t); and
- (4) the employer's expense to provide the benefit (Exp).

The first three factors combine to produce the cash wage equivalent (CWE), which is the maximum amount by which the employer can adjust wages downward because of the tax-free fringe benefit. The potential gain to the employer is therefore the savings in cash wages as a result of the downward wage adjustment (CWE) minus the employer's cost (Exp). More formally:⁷³

$$(1) \text{ CWE} = \frac{V - t \cdot TV}{1 - t}$$

$$(2) \text{ Gain} = \frac{V - t \cdot TV}{1 - t} - \text{Exp}$$

When the fringe benefit is tax-free, $t \cdot TV = 0$, so:

$$(3) \text{ Gain} = \frac{V}{1 - t} - \text{Exp}$$

⁷² A Freudian slip is weak authority for any proposal, but it is perhaps significant that the *Harvard Law Review* used the word "optional," *Federal Income Taxation*, *supra* note 16, at 1144, when they meant optimal, *see Id.* at 1164 n.113.

⁷³ An example will illustrate the application of these formulas. If the value placed on the benefit by the employee is \$1,500 (V) and the value at which the benefit is included in income is also \$1,500 (TV), the cash wage equivalent is \$1,500.

2. The Problem of Increasing a Low Cash Wage Equivalent

Because separate negotiations with different employees is difficult, the cash wage equivalent that determines the downward wage adjustment and therefore the employer's total gain is the cash wage equivalent of the marginal employees with the lowest value for the fringe benefit. Thus, employees other than those at the marginal level will continue to benefit from the tax exemption because the downward wage adjustment will not eliminate their benefit.⁷⁴ The employer could increase the cash wage equivalent of the marginal employees by offering them, in addition to a single fringe benefit, either cash in excess of the cash wage equivalent of the single fringe benefit or a second fringe benefit with a higher cash wage equivalent. Indeed, the best way to raise the cash wage equivalent of the marginal employees is to experiment with such a cash option to see whether it is selected by the marginal employees, then to search for a fringe benefit with a higher cash wage equivalent for those employees than the cash, and so on, until the fringe benefit chosen by the marginal employees has almost the same cash wage equivalent as the benefit received by the other employees. In that way, tax inequity would be reduced if not eliminated.

Upon entering the bargaining process, however, an employer who uses cash and fringe benefit options to increase the cash wage equivalent may encounter difficulty. The options, if elected by the marginal employees, might reduce the employer's gain by more than the increase in gain resulting from the higher cash wage equivalent used to reduce the wages of other employees. Table 2 illustrates this problem.

In Table 2A, it is assumed that the employer pays \$1,500 per employee to provide a single fringe benefit to five employees in the 25% tax bracket.⁷⁵ The cash wage equivalent is \$2,000 for four of the employees and \$4,000 to the fifth employee. The employer is able to reduce the cash wages of all five employees by \$2,000, thereby gaining \$500 per employee, or a total gain of \$2,500. In Table 2B, however, the four marginal employees elect a \$2,800 cash option, while the fifth employee continues to elect the fringe benefit because of the higher value — \$4,000 — he places on the benefit. The employer derives no gain on the payment of cash, losing the \$2,000 gain he enjoyed when the four marginal employees elected the fringe benefit. The downward wage adjustment for the fifth employee increases to \$2,800, which is the amount of the cash option, but that only increases the gain from providing that employee with a

$$(1) \text{ CWE} = \frac{1500 - .25 (1500)}{1 - .25}$$

This is hardly surprising. The taxable value of \$1,500 cash is \$1,500 and that is also its cash wage equivalent. If the benefit were a life insurance benefit that cost the employer \$1,200, the employer would gain \$300 by reducing the employee's wages by \$1,500.

$$(2) \text{ Gain} = 1500 (\text{CWE}) - 1200 (\text{Exp})$$

When the benefit is tax-free ($TV = 0$), the gain would be \$800.

$$(3) \text{ Gain} = \frac{1500 - .25 (0)}{1 - .25} - 1200 = 800$$

⁷⁴ See Part II-D *supra*.

fringe benefit from \$500 to \$1,300. The \$800 increase is offset by a \$2,000 decline, so that the employer's gain in Table 2B is \$1,200 less than it was in Table 2A where the single fringe benefit was offered.

TABLE 2

*Employer's and Employee's Gain from Offering Tax-Free Fringe Benefit(s),
Assuming Employee's Tax Rate is 25%*

A. *Single fringe benefit offered; Cost = \$1,500 per employee;
Value to marginal employee = \$1,500;
Value to other employee = \$3,000*

	(1) <i>Employer's cost per employee</i>	(2) <i>Cash wage equivalent</i>	(3) <i>Downward cash wage adjustment</i>	(4) <i>Employer's gain (Column 3 - 1)</i>	(5) <i>Employee's gain (Column 2 - 3)</i>
4 marginal employees	6,000	8,000 ^a	8,000	2,000	0
1 other employee	1,500	4,000 ^b	2,000	<u>500</u>	2,000
				2,500 =	
				<i>Total gain</i>	

B. *Cash option (fringe benefit as in 2A above, or \$2,800 cash);
marginal employees elect cash*

	(1) <i>Employer's cost per employee</i>	(2) <i>Cash wage equivalent</i>	(3) <i>Downward cash wage adjustment</i>	(4) <i>Employer's gain (Column 3 - 1)</i>	(5) <i>Employee's gain (Column 2 - 3)</i>
4 marginal employees	11,200	11,200 ^c	11,200	0	0
1 other employee	1,500	4,000 ^b	2,800	<u>1,300</u>	1,200
				1,300 =	
				<i>Total gain</i>	

^a V = \$1,500 per employee. Therefore

$$CWE = \frac{V - t \cdot TV}{1 - t} = \frac{1500 - .25(0)}{1 - .25} = \frac{1500}{.75} = 2000$$

Four employees therefore have an \$8,000 cash wage equivalent (4 × \$2,000).

^b V = \$3,000 per employee. Therefore

$$CWE = \frac{V - t \cdot TV}{1 - t} = \frac{3000 - .25(0)}{1 - .25} = \frac{3000}{.75} = 4000$$

^c The cash wage equivalent of \$2,800 cash is \$2,800. Four employees therefore have an \$11,200 cash wage equivalent (4 × \$2,800).

C. *Fringe benefit option (fringe benefit as in 2A above, or fringe benefit with cost = \$2,800 and Value = \$2,250 to marginal employees); marginal employees elect more costly benefit*

	(1) <i>Employer's cost per employee</i>	(2) <i>Cash wage equivalent</i>	(3) <i>Downward cash wage adjustment</i>	(4) <i>Employer's gain (Column 3 - 1)</i>	(5) <i>Employee's gain (Column 2 - 3)</i>
4 marginal employees	11,200	12,000 ^d	12,000	800	0
1 other employee	1,500	4,000 ^b	3,000	1,500	1,000
				2,300 =	
				<i>Total gain</i>	

^d V = \$2,250 per employee. Therefore

$$\text{CWE} = \frac{V - t \cdot \text{TV}}{1 - t} = \frac{2250 - .25(0)}{1 - .25} = \frac{2250}{.75} = 3000$$

Four employees therefore have a \$12,000 cash wage equivalent (4 × \$3,000).

In Table 2C, the employer provides an option to receive a second fringe benefit with a higher cash wage equivalent for marginal employees. The result of such an option, like the cash option in Table 2B, is that the employer realizes a smaller gain than he would if a single fringe benefit were offered. Table 2C assumes that the cash wage equivalent of the second fringe benefit is \$3,000, but that its cost is \$2,800. The employer's gain from the election of this benefit by the four marginal employees is only \$200 per employee, or a total of \$800, which is \$1,200 less than the gain realized when the first fringe benefit was elected. The employer's gain from increasing the downward wage adjustment of the fifth employee, however, is \$1,500, which is \$1,000 more than the gain realized when the first fringe benefit was chosen. Yet when the transactions with all five employees are considered together, the employer in Table 2C realizes only a \$2,300 gain, which is \$200 less than the employer's gain in Table 2A. Hence the material in Tables 2A, 2B, and 2C indicates that the cash wage equivalent might prove too costly for the employer.

3. Eliminating Opportunity Cost by Mandatory Cash Option

Offering both cash and fringe benefit options is a necessary step towards increasing the cash wage equivalent of the marginal employees and thus improving the likelihood of achieving tax equity. Yet the monetary disadvantage of such options, as illustrated by Tables 2A-C, may cause many employers to offer single fringe benefits. It is proposed here, however, that the financial loss resulting from these options can be removed by taxing fringe benefits when a cash option is not offered. The purpose of this tax would be to eliminate any gain an employer might receive from offering a single fringe benefit to the marginal

⁷⁵ See note 73 *supra*.

employees. The tax would achieve its purpose by reducing the cash wage equivalent of such benefit so that it does not exceed the employer's expense. Therefore, the tax would eliminate the opportunity cost of experimenting with cash and fringe benefit options. The likelihood that a tax will have that effect depends on the relative magnitudes of the components of the formula determining the employer's gain — the value of the benefit to the employee, the value at which the benefit is included in the employee's tax base, and the employer's expense in providing the benefit. These effects are summarized in Table 3.

TABLE 3

Existence of Employer Gain, Depending on Value to Employee (V), Taxable Value (TV), and Employer's Expense (Exp)

- (A) No gain⁷⁶
 $\text{Exp} \geq \text{TV}$, and $V \leq \text{TV}$
- (B) Gain⁷⁷
 $\text{Exp} \leq \text{TV}$, and $V > \text{TV}$
 $\text{Exp} < \text{TV}$, and $V = \text{TV}$

⁷⁶ This conclusion is derived as follows:

No gain: Assume $V = \text{TV}$ and $\text{Exp} = \text{TV}$. If there is no gain, on these assumptions, there is no gain if either $V < \text{TV}$ or $\text{Exp} > \text{TV}$, because reducing value to the employee or increasing the employer's expense reduces gain.

$$\begin{aligned}\text{Gain} &= \frac{V - t \cdot \text{TV}}{1 - t} - \text{Exp} = \\ &= \frac{\text{TV} - t \cdot \text{TV}}{1 - t} - \text{TV} = \\ &= \frac{(1 - t)(\text{TV})}{1 - t} - \text{TV} = 0\end{aligned}$$

⁷⁷ This conclusion is derived as follows:

Gain (1) Assume $V = \text{TV}$ and $\text{Exp} < \text{TV}$.

$$\begin{aligned}\text{Gain} &= \frac{V - t \cdot \text{TV}}{1 - t} - \text{Exp} = \\ &= \frac{\text{TV} - t \cdot \text{TV}}{1 - t} - < \text{TV} = \\ &= \frac{(1 - t)(\text{TV})}{1 - t} - < \text{TV} = \\ &= \text{TV} - < \text{TV} = \\ &= + \text{Gain}\end{aligned}$$

(2) Assume $V > \text{TV}$ and $\text{Exp} = \text{TV}$. If there is gain on these assumptions, there is gain if $\text{Exp} < \text{TV}$ because a reduction in expenses increases gain.

$$\text{Gain} = \frac{V - t \cdot \text{TV}}{1 - t} - \text{Exp} =$$

(C) *Uncertain*⁷⁸

$$\text{Exp} < \text{TV}, \text{ and } V < \text{TV}$$

$$\text{Exp} > \text{TV}, \text{ and } V > \text{TV}$$

While the employer still can derive gain from offering a taxable rather than a tax-free fringe benefit, the probability of this occurring is diminished where there are marginal employees placing a low value on the fringe benefit and where the employer's expense is substantial. Indeed, when the employee's value is equal to or less than the taxable value ($V \leq \text{TV}$), there is no gain to the employer as long as the employer's expense is equal to or greater than taxable value ($\text{Exp} \geq \text{TV}$) (see Table 3A). These conditions are quite likely with category one benefits⁷⁹ for two reasons. First, the marginal employee's value probably will not exceed the substantial value included in taxable income, and second, the employer's expenses are substantial. When the employee's expense is also less than taxable value ($V < \text{TV}$, $\text{Exp} < \text{TV}$), the existence of employer gain is uncertain, (see Table 3C), but seems quite likely for category two benefits,⁸⁰ where expenses are very small. An additional taxing provision is therefore necessary to

$$\frac{> \text{TV} - t \cdot \text{TV}}{1 - t} - \text{TV} =$$

$$\frac{> (1 - t)(\text{TV})}{1 - t} - \text{TV} =$$

$$> \text{TV} - \text{TV} =$$

$$+ \text{Gain}$$

⁷⁸ This conclusion is derived as follows:

(1) Assume $V < \text{TV}$ and $\text{Exp} < \text{TV}$.

$$\text{Gain} = \frac{V - t \cdot \text{TV}}{1 - t} - \text{Exp} =$$

$$\frac{< \text{TV} - t \cdot \text{TV}}{1 - t} - < \text{TV} =$$

$$\frac{< (1 - t)(\text{TV})}{1 - t} - < \text{TV} =$$

$$< \text{TV} - < \text{TV} =$$

$$\pm \text{Gain}$$

(2) Assume, $V > \text{TV}$ and $\text{Exp} > \text{TV}$.

$$\text{Gain} = \frac{V - t \cdot \text{TV}}{1 - t} - \text{Exp} =$$

$$\frac{> \text{TV} - t \cdot \text{TV}}{1 - t} - > \text{TV} =$$

$$\frac{> (1 - t)(\text{TV})}{1 - t} - > \text{TV} =$$

$$> \text{TV} - > \text{TV} =$$

$$\pm \text{Gain}$$

⁷⁹ See text at notes 18-21 *supra*.

⁸⁰ See text at notes 22-41 *supra*.

eliminate the employer's gain when category two benefits are taxable. This provision should require taxable value to be multiplied by the reciprocal of the tax rate. Under this rule, the employer's gain will be removed even where his expenses are zero, as long as the value to the employee is equal to or less than taxable value ($V \leq TV$).⁸¹ If Congress views this provision as overly bizarre, it could require the taxable value to be quadrupled. This requirement would eliminate gain for employees in at least the 25% tax bracket. Although this rule appears harsh, it can be avoided by offering the cash option.

By focusing again on Table 2 and then on Table 4, it can be demonstrated that the proposal presented here — the taxation of fringe benefits not accompanied by a cash option — does encourage the use of a cash option. In Table 2, the employer's gain without the cash option was \$2,500, but it declined to \$1,300 if the marginal employees elected a \$2,800 cash option. Table 4 adopts the same assumptions about the value of the benefit to the employees and the employer's expense as in Table 2 and makes the further reasonable assumption that the value to the marginal employees is not greater but is at least equal to the taxable value of the benefit ($V = TV$). Table 4 also assumes that the employer's expense is substantial, at least equal to the taxable value ($Exp = TV$). On these assumptions, the employer's gain increases rather than decreases when the employee is offered a cash option along with a fringe benefit because there is no gain to the employer when the cash option is not offered. If the employer's expense is less than taxable value, the taxable value must be increased, as explained above,⁸² in order to eliminate any employer gain from offering a taxable fringe benefit.

In sum, if fringe benefits not accompanied by a cash option are taxed, the employer is encouraged to offer cash options. Once the employer offers marginal employees a choice of cash or a fringe benefit, with a likelihood that the cash will be elected, the employer can only gain by searching for additional fringe benefits to offer the marginal employees. The employer's goal in the search is to locate benefits with a cash wage equivalent higher and a cost lower than the cash option. Such benefits will prompt the employee to reject the cash

⁸¹ Assume $Exp = 0$ and $V = TV$. The assumption that value (V) is not greater than taxable value (TV) is plausible for marginal employees. If gain is zero on these assumptions, there is no gain when $V < TV$ because gain declines as V declines. If TV is multiplied by the reciprocal of the tax rate, $\frac{1}{t}$, gain is as follows:

$$\begin{aligned} \text{Gain} &= \frac{V - (t \cdot TV) \frac{1}{t}}{1 - t} - Exp = \\ &= \frac{TV - (t \cdot TV) \frac{1}{t}}{1 - t} - 0 = \\ &= \frac{TV - TV}{1 - t} = 0 \end{aligned}$$

⁸² See text and note at note 81 *supra*.

option and, if selected, they will provide the employer with a gain. More importantly, by increasing the cash wage equivalent of the marginal employees, these benefits will reduce, if not eliminate, tax inequity.

TABLE 4

*Employer's and Employee's Gain from Offering Fringe Benefit,
with and without Cash Option;
Exemption conditioned on Cash Option;
same assumptions as in Table 2A and 2B*

	(1) <i>Employer's cost per employee</i>	(2) <i>Cash wage equivalent</i>	(3) <i>Downward cash wage adjustment</i>	(4) <i>Employer's gain (Column 3 - 1)</i>	(5) <i>Employee's gain (Column 2 - 3)</i>
A. Fringe Benefit: No Cash Option					
4 marginal employees	6,000	6,000 ^a	6,000	0	0
1 other employee	1,500	3,500 ^b	1,500	0	2,000
				0 =	
				<i>Total gain</i>	
B. Fringe Benefit; \$2,800 cash option elected by marginal employees					
4 marginal employees	11,200	11,200 ^c	11,200	0	0
1 other employee	1,500	4,000 ^d	2,800	1,300	1,200
				1,300 =	
				<i>Total gain</i>	

^a CWE is \$1,500 per employee, derived as follows:

$$\text{CWE} = \frac{V - t \cdot TV}{1 - t}$$

On the assumption that $V = TV$ and $\text{Exp} = TV$, then $V = \text{Exp} = \$1,500$, and

$$\text{CWE} = \frac{\text{Exp} - t \cdot \text{Exp}}{1 - t} = \frac{(1 - t)(\text{Exp})}{1 - t} = \text{Exp} = \$1,500$$

^b \$3,500 is determined as follows, based on the same assumptions as Table 2. The nonmarginal employee had a cash wage equivalent of \$4,000 for the fringe benefit, when $V = 3,000$, $t = 25\%$, and $TV = 0$. If the taxable value (TV) is the same as for the marginal employees (\$1,500) even though the value (V) is higher, $\text{CWE} = 3,500$ as follows:

$$\text{CWE} = \frac{3,000 - .25(1,500)}{1 - .25}$$

^c \$2,800 cash per employee.

^d See Table 2, note b.

4. Other Advantages of a Mandatory Cash Option

A mandatory cash option could contribute to tax equity not only by increasing the cash wage equivalent of the marginal employees, but also by increasing the cash wage equivalents of all employees to a level that more nearly reflects actual value. Two of the factors that prevented actual value from entering into the wage negotiation processes were the employee's failure to focus on the benefit and concealment of preferences.⁸³ When cash is offered to the employee, the employee is more likely to pay attention to the benefit and is less able to pretend lack of concern to the employer. Thus the actual value is more likely to be assigned to the benefit.

5. Limitations of the Proposal

When defining the specific content of a mandatory cash option plan, it should be noted that there are several limitations to such a plan in reducing tax equity. For example, personal benefits which are a by-product of costs incurred by the employer for noncompensatory reasons⁸⁴ — category three benefits — cannot be included in a cash option-fringe benefit package. The reason for excluding category three benefits is that they are an incident of business-related expenses which cannot be made optional with the employee. Another method must therefore be used to prevent tax inequity when these benefits are provided to employees.⁸⁵ Other limitations of the mandatory cash option proposal are that it can neither prevent discounting for uncertain value nor overcome an employee's strong bargaining position. Moreover, even with the mandatory cash option, some employers still might not experiment with the cash option and alternative fringe benefits to capture more of the tax benefit enjoyed by the non-marginal employees. This failure to experiment seems especially likely if, as noted earlier,⁸⁶ there remains some gain to the employer from offering a single taxable fringe benefit. Thus, the effect of the mandatory cash option in raising the cash wage equivalents of the marginal employees should not be overestimated.

Because of these limitations in the effectiveness of the cash option in reducing tax inequity, fringe benefits that seriously violate tax equity should be taxable despite the existence of a cash option. Three types of currently tax-free benefits fit within this particular category. The first type includes those benefits that discriminate in favor of controlling or high-income employees.⁸⁷ These benefits violate vertical as well as horizontal equity and remove pressure on employers to provide them on a nondiscriminatory basis. Thus such benefits — for example, free insurance and personal travel⁸⁸ — should be taxed when they are provided to executives on a preferential basis, even though a cash option exists. The second type includes those benefits financed by costs incurred for compensatory reasons — category one benefits. These benefits are likely to be much larger and easier to value than benefits which are incidental to noncom-

⁸³ See text at notes 61-65 *supra*.

⁸⁴ See text at notes 46-57 *supra*.

⁸⁵ See text at notes 92-97 *infra*.

⁸⁶ See text and note at note 81 *supra*.

⁸⁷ See text and note at note 45 *supra*.

⁸⁸ Discussion Draft, *supra* note 10, at § 1.61-16(f) (Examples 5(a) & 9).

pensatory costs, that is, category two benefits.⁸⁹ Therefore, unless category one benefits are socially desirable, they should be taxed without regard to a cash option.⁹⁰ For example, all employees should be taxed if they receive free cars for personal use for which the employer incurs substantial additional costs.⁹¹ The third type includes category two benefits which are sometimes so substantial despite the negligible marginal cost to the employer that the technique of a mandatory cash option should not be trusted to improve tax equity. Free tuition for families of university employees is an example.⁹²

In sum, strong support exists for a requirement that fringe benefits be accompanied by a cash option if such benefits are to remain tax-free. A mandatory cash option will encourage employers to increase the cash wage equivalent of the marginal employees and thus reduce tax inequity. Nevertheless, because of its limitations, the cash option should exempt benefits from taxation only if they are nondiscriminatory, socially desirable category one benefits or nondiscriminatory category two benefits that are not too substantial.

B. *Taxation of Controlling and Highly Paid Employees*

The first proposal analyzed the possibility of using a mandatory cash option to reduce tax inequity. In the case of category three benefits, however, an option cannot be offered to the employee because the personal benefits are a necessary by-product of employer costs incurred for noncompensatory reasons. The only way to tax such benefits is to include their value in income. Yet the prospect of doing this creates the spectre of administrative arbitrariness, which can be avoided only by adopting rules that also might be arbitrary and at the same time include too much income in the tax base. For example, it seems unlikely that the psychic value of prestige and enjoyment from work could ever be taxed success-

⁸⁹ See text at notes 26-31 and 33-34 *supra*.

⁹⁰ The SEC remuneration disclosure rules also make a distinction between socially desirable and "personal benefits." Only the latter must be separately footnoted if they exceed the lesser of \$10,000 or 25% of remuneration. 17 C.F.R. § 229.20 - Item 4, Instruction 2(d)(iii) (1979).

⁹¹ Discussion Draft, *supra* note 10, at § 1.61-16(f) (Example 14).

⁹² Treas. Reg. § 1.117-3(a) (1980). Single benefits that are large in the aggregate are another example. See note 31 *supra*.

A new Treasury publication, which has been widely distributed but has not been published in the Federal Register, takes a less generous approach than the Discussion Draft to fringe benefits for which the employer incurs no marginal cost. See The Carter Treasury's Fringe Benefit Discussion Draft, 12 TAX NOTES 131 (Jan. 26, 1981). These new proposals eliminate the "no employer marginal cost" criterion for determining exempt benefits. Nevertheless, they would exclude bargain sales of the employer's merchandise if the value of the bargain to the employee was small. *Id.* at 134-35, § 1.61-19(b)(1), (c)(1-5). Such benefits as reduced price airline trips for employees, *id.* at 133, § 1.61-17(d)(1), or their spouses, *id.*, § 1.61-18(d)(9), the free use of cars, *id.* at 133, 135, § 1.61-18(d)(3), -19(c)(9), and free tuition to faculty children, *id.* at 133; § 1.61-17(d)(2); *id.* at 136, § 1.117-3(a), would be taxed. These proposals are consistent with the proposal in the text to the extent they would tax potentially serious cases of tax inequity.

fully.⁹³ Nevertheless, the problems of arbitrariness and overtaxation are minimized where a tax is placed on only those benefits that are clearly substantial and enjoyed by most taxpayers. For instance, travel and entertainment expenses are so likely to provide personal enjoyment to most employees, because they usually replace normal living expenses and provide a luxury sought by most people, that a rule taxing such expenditures in excess of some minimum amount would be fair.

In the past, the political process has failed to generate such rules to achieve tax equity. Consequently, in an effort to stimulate that process, the following proposal is made. Only controlling and high-income employees should be taxed upon receipt of substantial category three benefits. Such employees might be defined as persons earning more than \$35,000, a figure that could be adjusted annually for inflation.⁹⁴ Such selective taxation of benefits received by high-income and controlling employees would be a departure from typical United States practice,⁹⁵ but is a well-established feature of the United Kingdom tax system. The United Kingdom is exceedingly tolerant in taxing an employee's in-kind benefits,⁹⁶ but its tolerance ends when the employee is a director or highly paid employee.⁹⁷ The rationale for focusing on only these employees is that they present the most serious equity problems because they are in higher tax brackets and because their greater control over when and where to incur the business expense increases the likelihood that they will obtain a personal benefit. Moreover, the limited application of the rule would confront the Internal Revenue Service with a manageable task. These reasons should commend the proposal to a legislature otherwise disposed to let inertia decide how fringe benefits should be taxed.

⁹³ Halperin, *supra* note 18, at 880-85, 892-94.

⁹⁴ The SEC remuneration reporting requirements use a salary cut-off point. They apply only if remuneration, including in-kind prerequisites, exceeds \$50,000. 17 C.F.R. § 229.20-Item 4(a)(1) (1979).

The use of a cut-off point for tax purposes presents a "notch" problem, because the marginal tax rate suddenly jumps when a taxpayer's income rises above that point. The problem could be alleviated by including only a percentage of the taxable value of fringe benefits when income exceeds the cut-off point and gradually increasing the percentage as income rises. Examples of tax benefits disappearing with rising income appear in I.R.C. §§ 37(c), 43(b), and 85(a)(1).

⁹⁵ But see note 65 *supra*.

⁹⁶ As a general matter, benefits which cannot be converted into money are not taxable, except in the case of accommodations and medical insurance. 1 BRIT. TAX GUIDE (CCH) §§ 14-24, 14-35, 14-34A. In addition, transferable vouchers are taxable at the employer's cost, not their resale market value. *Id.* at 14-34B. The exemption of in-kind benefits may not be as generous as it appears, however, because of the definition of in-kind benefits. For example, a compulsory deduction from wages for an in-kind benefit is treated as taxable cash wages. *Id.*, at 14-27. *Cf.* Treas. Reg. § 1.119-1(a)(3)(ii) (1979) (employer deduction of an unvarying flat amount from wages to pay for meals is not compensation; value of meals taxed in accordance with I.R.C. § 119). Moreover, employers cannot deduct entertainment expenses that redound to the benefit of employees unless they include the benefits in taxable wages, in which case the employee cannot deduct the expense. 1 BRIT. TAX GUIDE (CCH) §§ 8-85, 14-56. *See also* I.R.C. § 274(a), (e)(3-4).

⁹⁷ 1 BRIT. TAX GUIDE (CCH) § 14-35 (directors and employees whose salaries are at least £5000 taxable on in-kind benefits).

TABLE 5
Summary of Proposals

<i>Type of expense</i>	<i>Controlling and high-income employees</i>	<i>Other employees</i>
<i>Category 1 — Employer Costs incurred for compensation</i>		
a. <i>Nondiscriminatory — socially useful</i> (Example — group insurance for reasonable classification of employees)	Exempt, if cash option	Exempt, if cash option
b. <i>Nondiscriminatory — not socially useful</i> (Example — free use of car by car salesmen)	Tax	Tax
c. <i>Discriminatory</i> (Example — receipt of free insurance or free commuting benefits by executives)	Tax	— ^a
<i>Category 2 — Employer Costs for noncompensatory reasons, except for insubstantial amount and for opportunity cost of charging employees; added value available to employee</i>		
a. <i>Nondiscriminatory</i> (Example — bargain sales to reasonable classification of employees)	Exempt, if cash option; ^b tax on 4 times taxable value if no cash option	Exempt, if cash option; ^b tax on 4 times taxable value if no cash option
b. <i>Discriminatory</i> (Example — free travel for relatives of executives on business trips)	Tax	— ^a
<i>Category 3 — Employer Costs for non- compensatory reasons; personal consumption necessary by-product of expense</i> (Example — business travel and entertainment)	Tax certain benefits; taxable amount set by objective rules of thumb	No tax

^aThe assumption is that no rule providing benefits to employees who have neither high income nor control of the employer could violate the policy against discrimination. In special cases, such as relatives of executives, that assumption might be unjustified.

^bIf the benefit provides substantial value in relation to marginal cost, the benefit would be taxed regardless of the cash option. See note 92 *supra*.

CONCLUSION

The current paralysis in dealing with fringe benefits reflects more than theoretical and administrative difficulties. It also arises from a sense that taxing fringe benefits is not worth the effort involved. At tax meetings, complaints are often heard regarding the time wasted by the government in harassing recipients of fringe benefits. To the critics, problems such as tax shelters, capital gains, and date of death value are important. On a more academic note, one might be concerned that emphasis on fringe benefits will have the effect Professor Bittker worried about when he warned that the tax expenditure approach might hurt workers and favor investors.⁹⁸

It would be a mistake, however, to be too sanguine about the exemption of employee fringe benefits, for the amount is not negligible. Chamber of Commerce figures for 1978 report benefits as the following percentage of payroll: pension benefits — 5.6%;⁹⁹ insurance and disability benefits — 6.1%;¹⁰⁰ bargain discounts — .1%;¹⁰¹ meals furnished to employees — .2%;¹⁰² and education benefits — 1%.¹⁰³ Many other benefits — such as use of company cars and planes and the personal benefit from travel and entertainment — never appear in the statistics. Moreover, while the distribution of benefits by income class is not known, such benefits are probably concentrated among higher-income employees. This distribution is especially true of benefits other than insurance and pensions.¹⁰⁴ In addition, fringe benefits are likely to be distributed unequally among employees within the same income class. Because of differences in the attitudes and capabilities of auditors, uneven administration of the law combines with this uneven distribution of benefits to produce a justified cynicism about the Internal Revenue Service as well as the tax law.

The approach taken by the proposals in this article is first to focus the agency's attention on those benefits raising the most serious equity problems, and then to encourage the marketplace to deal with the remaining problems. As Table 5 shows, employees would be taxed on discriminatory benefits, on non-discriminatory benefits which are not socially useful and whose costs are incurred for compensatory reasons, on nondiscriminatory benefits which provide substantial value in relation to marginal cost, and on benefits derived by controlling and high-income employees as a by-product of employer business expenditures. All other benefits would be tax-exempt, except that nondiscriminatory benefits which provide value in excess of marginal cost would be exempt only if the employee were given a cash option in lieu of benefits. Equity would thereby be achieved without disregarding administrative concerns.

⁹⁸ Bittker, *Accounting for Federal "Tax Subsidies" in the National Budget*, 22 NAT'L TAX J. 244, 259, (1969).

⁹⁹ U.S. CHAMBER OF COMMERCE, ANNUAL SURVEY OF FRINGE BENEFITS, *reprinted in* BNA, DAILY REPORT 248, at X-5, Table 4, § 2a (December 26, 1979).

¹⁰⁰ *Id.* § 2b, c, d.

¹⁰¹ *Id.* § 2e.

¹⁰² *Id.* § 2f.

¹⁰³ *Id.* § 5d.

¹⁰⁴ The author is unaware of published data on the distribution of tax preferences for fringe benefits by income class. See Miner, *Who Doesn't Bear the Tax Burden*, in *THE ECONOMICS OF TAXATION* 55 (H. AARON & M. BOSKIN ed. 1980).